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# One of Nine — Mr. Justice Burton's Appointment to the Supreme Court

*Daniel S. McHargue*

**I**N TWO WAYS Associate Justice Harold Hitz Burton is one of nine. First, he is one of the nine Justices currently comprising the personnel of the Supreme Court of the United States and the only Republican member thereof. Second, he is one of the nine men appointed to or promoted on our nation's highest tribunal by Presidents belonging to a different political party and the only Republican placed upon that bench by a Democratic President.

The nine tenures held by Justices whose partisan affiliation differed from that of the chief executive responsible for their selection comprise

only about 10% of a total of some ninety-one Supreme Court tenures.<sup>1</sup> Prior to 1945 no Democratic President had appointed a Republican to our highest court despite the fact that

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some six Democrats had been so honored by Republican Presidents. Two Associate Justices, one from each major party, had been moved to the center chair by a President belonging to a different party.

Students of Supreme Court appointments normally face a difficult task in attempting to determine the motives governing such selections since Presidents seldom reveal the real factors which dictate their choices. Mr. Truman, like other Presidents, did not release statements detailing the reasons for his selections of Supreme Court personnel. Though recognizing the difficulty of the task, the author will attempt to describe the factors which probably led President Truman to choose Mr. Burton as his first appointee to the highest court.

The resignation of Owen Josephus Roberts in July, 1945 left the court with one Republican, Chief Justice Harlan F. Stone, and seven Democrats:

<sup>1</sup> The nine were Stephen J. Field (D) appointed by Lincoln (R) in 1863; Howell E. Jackson (D) by Harrison (R) in 1893; Horace H. Lurton (D), 1909, Edward D. White (D) from Associate Justice to Chief Justice, 1910, and Joseph R. Lamar (D), 1910 by Taft (R); Pierce Butler (D) by Harding (R), 1922; Benjamin N. Cardozo (D) by Hoover (R), 1932; Harlan F. Stone (R) from Associate Justice to Chief Justice by Roosevelt (D), 1941; and Harold H. Burton (R) by Truman (D), 1945.

Associate Justices Hugo L. Black, Stanley F. Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, Robert H. Jackson and Wiley B. Rutledge. Despite the fact that it has been felt generally that the partisan composition of the high court should not be too far out of balance, there is some evidence that President Truman wished to confer his first Supreme Court nomination upon a Democrat.

Democratic possibilities included Senator Carl Hatch of New Mexico and former Senators Sam Bratton of New Mexico and Sherman Minton of Indiana.<sup>2</sup> The late Lewis Schwellenbach—then Secretary of Labor and former Senator—claimed that he had been promised Truman's first Supreme Court vacancy. However, the President's advisors convinced him that he had to name a Republican to the vacant chair. This decision automatically eliminated Schwellenbach and other Democrats from consideration.

Among the Republicans seriously considered for the place was Senator Warren Austin of Vermont, but his age of sixty-seven was against him. President Truman gave scant attention to the suggestion that he name Senator Wayne Morse of Oregon, who had verbally attacked him on the floor of the Senate.

It is reported that at one time President Truman told the late Under-Secretary of War Robert P. Patterson of New York he could have the place. However, he soon changed his mind, and Mr. Patterson was asked to become Secretary of War instead.<sup>3</sup> Some consideration was given to Circuit Judges John J. Parker of North Carolina and Orrie L. Phillips of Colorado.

After the decision to name a Republican and to use Judge Patterson in a cabinet position was made, President Truman's thoughts turned to available Republicans in the Senate. He had come to know well the Senators who had served under his chairmanship on the Special Committee to Investigate the National Defense Program (the so-called Truman Committee) and had been greatly impressed by the judicial temperament of Senator Burton, who always demanded that the facts be marshalled fully and studied carefully before action was taken.<sup>4</sup> This was true despite the fact that Senator Burton lacked judicial experience.

Investigation revealed that Senator Burton had earned a law degree from Harvard University, practiced law for some years, taught law at Western Reserve University, served as an infantry officer during World War I, belonged to the Board of Education of East Cleveland, Ohio, been a member

<sup>2</sup> "Pivotal Appointment," *Business Week*, July 14, 1945, p. 5.

<sup>3</sup> "The Judiciary," *Time*, October 1, 1945, p. 22.

<sup>4</sup> Forrester, *Mr. Justice Burton and the Supreme Court*, 20 *TULANE L. REV.* 11 (1945).

of the Ohio House of Representatives and had served as Law Director of the City of Cleveland and then as Mayor of that city before taking his seat in the Senate of the United States. The lack of judicial experience was not considered a handicap because of Burton's innate judicial qualities. His experience in responsible local and federal executive and legislative offices was regarded as a major qualification for service on the Supreme Court which deals largely with the interpretation of the Constitution, statutes and federal regulations.

The geographical or sectional factor, a factor to which Presidents have paid less attention since the Supreme Court Justices ceased to ride the circuit, was no particular obstacle since the Midwest was not overrepresented<sup>5</sup> and no other Justice was from Ohio. The political factors, if considered, were in Burton's favor. Ohio had traditionally been a key state in presidential campaigns and its citizens would be pleased by the selection of one of its residents for such a high position. Then, too, the Governor of Ohio, Frank J. Lausche, was a Democrat and could be counted on to fill the seat Burton vacated in the Senate with a Democrat.<sup>6</sup>

After considerable thought concerning the appointment and after receiving a favorable report from the Department of Justice concerning the character and integrity of the prospective appointee, President Truman made his decision. On September 17, 1945, he called Senator Burton, who at the moment was packed and ready to leave for Ohio, and asked him to drop by the White House. Burton taxied to the White House arriving at 5:15 p. m., and he asked the driver to wait. The interview took less than half an hour.

It has been gathered from responsible sources that the President had been impressed by Senator Burton's expressed views that Congress had the major legislative responsibilities under the Constitution and that it was the appropriate function of the courts to interpret such legislation and to refrain from judicial legislation, while at the same time limiting both the legislative and executive branches of the Federal Government and the states to the jurisdiction allowed them under the Constitution.<sup>7</sup> President Truman was impressed also with the fact that Senator Burton had not sought the

<sup>5</sup> At the time of Mr. Justice Burton's appointment in 1945 the geographical representation on the Supreme Court was as follows: Harlan F. Stone, New York; Hugo L. Black, Alabama; Stanley F. Reed, Kentucky; Felix Frankfurter, Massachusetts; William O. Douglas, Connecticut; Frank Murphy, Michigan; Robert H. Jackson, New York; and Wiley B. Rutledge, Iowa.

<sup>6</sup> Newsweek, October 1, 1945, p. 28.

<sup>7</sup> It is, perhaps, somewhat ironic that Mr. Justice Burton exemplified this quality when he voted with the majority in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 Sup. Ct. 863 (1952) in which the Supreme Court held that President Truman's order for seizing the steel mills was not within the constitutional powers of the chief executive.

appointment. The President had consulted with Chief Justice Stone and had received the latter's approval of Senator Burton's nomination before tendering it to him. Senator Burton later referred to the coincidence that he was offered the appointment on Constitution Day — September 17th. He regarded it as a call to duty in support of that instrument which he was not at liberty to decline.

President Truman nominated Senator Burton for the Supreme Court on September 18, 1945. The next day the Senate Judiciary Committee reported the nomination favorably and its chairman, Senator McCarran, urged favorable action. After the Senate had unanimously consented to the nomination, Senators Taft, Brewster, Barkley and Austin expressed approval of the appointment. The committee report and confirmation by the Senate took place under unanimous consent procedure.<sup>8</sup> The appointment received widespread approval in the press.

It has already been noted that when Harold Hitz Burton went on the court October 1, 1945, it marked the first time in our history that a member of the Republican party had been appointed to the highest bench by a Democratic President. President Truman attended the session of the Supreme Court at which Justice Burton was inducted into office. This is said to have been the first time in the history of the Court that a President attended one of its sessions.

The following summary indicates some of the factors that may have led to the selection of Mr. Justice Burton. It was considered proper that another Republican take the place vacated by Owen J. Roberts. Past association had convinced President Truman that Senator Burton possessed judicial qualities. Chief Justice Stone had expressed approval believing that legislative experience was a valuable qualification. The President could honor a friend and former colleague and at the same time increase his own party's majority in the Senate. The State of Ohio, traditionally a favored appointing ground because of its political vacillation, had no Justice on the bench nor was the Midwest overrepresented. Senator Burton was fifty-seven years old — a desirable age for Supreme Court appointees.

So it was that the circumstances of the times dictated that Harold Hitz Burton enjoy the unique distinction of being the first Republican ever appointed to the Supreme Court of the United States by a Democratic President.

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<sup>8</sup> *Journal of the Executive Proceedings of the Senate*, Vol. LXXXVII, 79th Congress, 1st Session, pp. 569-570.